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DEPARTMENT OF JUSTICE

28 CFR Part 16

[Docket No. OAG 155; A.G. Order No. 4442-2019]

RIN 1105-AB51

Department of Justice Freedom of Information Act Regulations

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: The Department of Justice, after consideration of the public comments, adopts without change the interim final rule amending the Department's regulations under the Freedom of Information Act (FOIA) that was published on January 4, 2017.

DATES: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Lindsay Roberts, Attorney-Advisor, Office of Information Policy, (202) 514-3642.

SUPPLEMENTARY INFORMATION: The Department issued an interim final rule amending the Department's regulations under the Freedom of Information Act (FOIA) to incorporate certain changes made to the FOIA, 5 U.S.C. 552, by the FOIA Improvement Act of 2016, Public Law 114-185, 130 Stat. 538 (June 30, 2016). 82 FR 725 (Jan. 4, 2017) Those changes included providing requesters 90 days to submit an administrative appeal and implementing certain notice requirements for FOIA response letters. The rule also updated the requirements pertaining to two FOIA fee categories, "representative of

the news media” and “educational institution,” to reflect recent decisions by the Court of Appeals for the District of Columbia Circuit. The rule went into effect on February 3, 2017. The Department received three public comments about the interim final rule. After carefully reviewing and considering all comments, the Department has determined to adopt the provisions of the interim rule in final form without change.

The first commenter did not suggest any changes to the rule, but instead generally provided his opinion on the importance of the FOIA and how it should operate.

The second comment pertained to duplication fees for student requesters and the services provided by the Office of Government Information Services (OGIS). The commenter noted that it is important for students to be able to obtain documents in a reasonably cost-effective manner, which is reflected in the decision rendered by the Court of Appeals for the District of Columbia Circuit in *Sack v. DOD*, 823 F.3d 687 (D.C. Cir. 2016). The commenter indicated that, despite qualifying for educational institution requester status, students will still be required to pay duplication fees. The commenter stated that duplication fees may become obsolete over time as records are maintained electronically and responses are likewise provided electronically. The commenter encouraged the Department to keep all records electronically to reduce duplication fees. The commenter suggested that the Department consider removing duplication fees, unless the component certifies that the records being produced are in paper format and the component does not possess an electronic copy.

The Department considered this comment and declines to remove the provision for charging applicable duplication fees to educational institutions. The FOIA provides that agencies shall promulgate regulations providing for reasonable standard charges for

duplication fees, which are the only type of fees assessed to educational institution requesters. See 5 U.S.C. 552(a)(4)(A)(ii)(II). The Department's regulations contain the directive that components "ensure that searches, review, and duplication are conducted in the most efficient and the least expensive manner." 28 CFR 16.10(a). Further, requesters qualifying as educational institutions are provided the first 100 pages of duplication (or the cost equivalent) without charge. § 16.10(d)(4)(i). Moreover, any requester may seek a fee waiver. Components grant fee waivers if the requester has demonstrated that disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. 5 U.S.C. 552(a)(4)(A)(iii); 28 CFR 16.10(k)(1). For all these reasons, the Department believes that no changes are needed to the provisions concerning the assessment of duplication fees for educational institutions.

The second commenter also provided his opinion about the helpfulness of advising requesters about the services available from the FOIA Public Liaison and OGIS. In response, the Department notes that the interim rule already directs components to inform requesters of the availability of the FOIA Public Liaison when providing notice of unusual circumstances and in all final responses. The Department also informs requesters of the services provided by OGIS when giving notice of unusual circumstances and in all adverse determinations. See 28 CFR 16.5(c) and 16.6(e)(5).

This commenter also suggested that § 16.8(d) be amended to require components to provide an explanation to the requester if a component chooses not to participate in mediation. The Department declines to make this change. Mediation is a voluntary

process and the statute does not require agencies to provide an explanation if they choose not to engage in this process. Consistent with the statute, the Department provides multiple opportunities for the requester and agency to communicate about a request. The Department also encourages components to have open communication with requesters throughout the request process and requesters can contact the component's FOIA Requester Service Center and FOIA Public Liaison any time during the processing of their request. As part of these communications, components may choose to explain why they decided not to participate in mediation in any given case.

The third commenter raised concerns about the exclusive use of web portals to accept FOIA requests electronically at some components. The commenter noted that different components have different portals, which can be confusing for requesters, and that some components also accept requests via email. The commenter suggested amending § 16.3(a) to require all components to accept requests via email, as well as through a portal or other means, and amending § 16.8(a) to require the Office of Information Policy (OIP) to receive appeals via email, in addition to using an online portal and other means. Currently, components must have the capability to accept requests electronically either through email or a web portal, but they are not required to provide both capabilities.

The Department considered this comment but, due to the efficiencies gained by using portals, declines to require components to receive requests and appeals via email in addition to online portals, or other methods. The Department recognizes that it may seem easier for requesters to have the option to use email instead of a web portal. Using web portals, though, actually provides significant efficiencies for both requesters and

components when compared to email. For example, when a requester submits a request via a web portal the component can start working on the request immediately upon receipt rather than having to manually enter the information contained in the email into the component's tracking system. Particularly for components that receive thousands of requests each year, this time savings can be significant and benefits requesters overall. Moreover, web portals also help requesters ensure that they provide all required information when submitting their request or appeal, a capability that is not available when requesters submit via email. Without any built-in structure, an email request might omit essential information and require the component to engage in additional back and forth with the requester before processing can begin. By contrast, a web portal form will guide the requester through the process, helping to ensure that all necessary information is provided from the start. This allows the component to start processing the request more quickly than would occur if it needed additional information from a requester who submitted an incomplete request via email. Again, this benefits all requesters.

The Department is committed to making it easy for the public to submit requests and appeals. The Department's FOIA Reference Guide, available on OIP's website, provides detailed instructions for making requests, and OIP maintains a single page on its website that lists contact information for all components. Every component has a FOIA Requester Service Center and FOIA Public Liaison who are available to answer questions about submitting requests. OIP works with components through the administrative appeal process and through its general compliance functions to help ensure that components' procedures are requester-friendly. Components are continually working to streamline the request and appeal submission process to the extent feasible while also

striving to use available resources most efficiently to ensure faster processing to benefit all requesters. Finally, the Department has developed a National FOIA Portal that the public can use to make requests that is designed to help standardize the request-making process across the government. The National FOIA Portal also contains a wealth of information to educate requesters on the FOIA and assist them in making requests. The National FOIA Portal contains a customized form for each agency and agency component that both follows a uniform format and provides a link to the authority for any specialized requirements that an agency or component might have for making requests. These features are designed to simplify and standardize the request-making process for the public. We expect to continually improve the functionality of the National FOIA Portal over time.

Regulatory Certifications

Executive Orders 12866 and 13563 - Regulatory Review

This regulation has been drafted and reviewed in accordance with Executive Order 12866, “Regulatory Planning and Review,” section 1(b), Principles of Regulation, and Executive Order 13563, “Improving Regulation and Regulatory Review,” section 1(b), General Principles of Regulation.

The Department of Justice has determined that this rule is not a “significant regulatory action” under Executive Order 12866, section 3(f), and accordingly this rule has not been reviewed by the Office of Management and Budget.

Both Executive Orders 12866 and 13563 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic,

environmental, public health and safety effects, distributive impacts, and equity). The Department conducted the required assessment for the interim final rule and this rule finalizes those regulations without change.

Regulatory Flexibility Act

This rule finalizes the amendment of the Department of Justice's regulations under the FOIA to incorporate certain changes made by the FOIA Improvement Act of 2016, and to reflect developments in the case law and to streamline the description of the factors to be considered when making fee waiver determinations. Because the Department was not required to publish a notice of proposed rulemaking for this rule, a Regulatory Flexibility analysis is not required. 5 U.S.C. 603(b).

Executive Order 13132 - Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, the Department has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988 - Civil Justice Reform

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it

will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

This rule is not a major rule as defined by the Congressional Review Act. 5 U.S.C. 804.

Paperwork Reduction Act

This rule imposes no information collection or record keeping requirements.

List of Subjects in 28 CFR Part 16

Administrative practice and procedure, Freedom of information, Privacy.

**PART 16—PRODUCTION OR DISCLOSURE OF MATERIAL OR
INFORMATION**

Accordingly, the interim rule amending 28 CFR part 16, which was published at 82 FR 725 on January 4, 2017, is adopted as a final rule without change.

Dated: April 17, 2019.

William P. Barr,
Attorney General.

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